mendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts in order that the corporation may thereafter maintain its organization, management and conduct of business in accordance with law. This would have made possible a separation of the good from the bad, and the existence of an association which possessed great possibilities—according to very good authority—to do the public a vast amount of good. G. E. L.

RESALE PRICE MAINTENANCE.—The doctrine that the producer of a patented or "branded" article may not fix the resale price has been stubbornly contested. However, the fight in behalf of the right seems to be a losing one. The Supreme Court of the United States has for some time been definitely committed to the rule that contracts, either express or implied, made between a producer and the wholesaler or retailer through whom he markets his product, having for their object the fixing of the resale price, are illegal and in violation of the Sherman Anti-Trust Act. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.* (1911), 220 U. S. 373; *Boston Store* v. *Graphophone Co.* (1918), 246 U. S. 8; *United States* v. *A. Schrader's Son, Inc.* (1920), 252 U. S. 85. Nor is such a contract saved by the fact that in form it purports to make the distributor simply an agent or licensee. The court will look to the real intent of the parties and judge the agreement accordingly. *Straus et al.* v. *The Victor Talking Machine Co.*, 243 U. S. 490. Mr. Justice Holmes, it is true, has consistently adhered to the contrary view. See *Garst* v. *Harris* (1900), 177 Mass. 72, and his dissenting opinions in the cases cited *supra*. Neither has the rule received universal recognition in the state courts in cases involving purely intrastate commerce. For a careful review of the authorities, see 19 MICH. L. REV. 265.

Some hope was left to the manufacturer through the decision in *United States* v. *Colgate & Co.*, 250 U. S. 300. That case seemed to hold that it was permissible for him to accomplish the result aimed at, so long as he did not seek to bind the distributor by contract. In effect, it seemed to say to him that if he could muster sufficient economic strength and create such a demand for his product that the distributor could not afford to do without it, then the producer could, by insistent warning and by a careful system of checking, accomplish unaided what the law would not assist him in achieving. See also *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 41 Sup. Ct. 451, in which the court disapproved an instruction to the jury to the effect that it might find that defendant had made a contract with its distributors fixing the resale price from the facts, if found, that the defendant had insistently notified them of its price schedules, and that they not only had not objected but had in fact coöperated in maintaining them.

However, a still more recent decision, viz., *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. 150, makes it at least doubtful whether this method of getting around the doctrine has not been made ineffective. The Beech-Nut Packing Company, while carefully refraining from making any contracts relating to resale prices, insistently impressed upon its distributors the fact that it would not sell to anyone who resold at other than the

stated prices or who sold to others who did. To make its threat effective it inaugurated a plan of marking packages, tracing sales, getting reports of violations of its price schedules through its own special agents and through loyal distributors, and of making lists classifying all distributors, retail as well as wholesale. The case was first heard before the Federal Trade Commission as an "agreed case," in which it was expressly stated that no contract, express or implied, for maintaining resale prices existed. The Commission, however, condemned the practices set forth as unfair competition within the meaning of Section 5 of the Federal Trade Commission Act, 38 St. at Large, 719, and in effect ordered the defendant to desist from refusing to sell to distributors simply because they failed to adhere to its resale price schedule. The Supreme Court, on a writ of certiorari, does lip service to the *Colgate* case in saying, in effect, that the Commission's order was too broad in that it sought to restrain the defendant from its "undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same." But it renders the decision in that case innocuous by holding that the Commission does have power to order the defendant to desist from making its threat effective by employing its own agents or securing the coöperation of loyal distributors in ferreting out violators of its price schedules. Among other things, the defendant is specifically prohibited from marking its cases so that it can detect violators; from making lists classifying distributors; from securing reports of violations from its agents or loyal distributors, and from "utilizing any other equivalent coöperative means of accomplishing the maintenance of prices fixed by the company." What is left to the producer, then, seems to be this: He may refuse to sell to anyone for any reason or no reason, and he may state in advance that he expects the purchaser to adhere to a certain price schedule. But he may not take any steps, either through his own special agents or through loyal distributors, to determine whether or not his injunctions are being obeyed, as a basis for future action. It may be doubted whether such a holding is conducive to the honest and "above board" competition which it was the aim of the Federal Trade Commission Act to foster. Violations of such an order will always be difficult to detect. Moreover, it places a premium on underhanded methods of doing business. If we must deny to the producer the right to fix resale prices, we might as well forbid expressly what we try to forbid by indirection, viz., the putting out of any resale price schedule at all. Such a rule would not lead to results that are any more unsound economically than does the present state of the law, and at least would have the merit of being definite and certain. Violations of it could be comparatively easily detected.

While the instant case arises under the Federal Trade Commission Act, it seems reasonably safe to assume that the rule will be held to be the same under the Sherman law. In fact, the court says that "the system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain" (page 183, *op. cit.*). G. C. G.